U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A- INC.

DATE: MAY 3, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of prepaid debit cards, sought to employ the Beneficiary as a financial analyst. It requested her classification as a member of the professions holding an advanced degree under the second-preference, immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, "EB-2" category allows U.S. businesses to sponsor foreign nationals for lawful permanent resident status in positions requiring master's degrees, or bachelor's degrees followed by five years of experience.

After first granting the filing, the Director of the Nebraska Service Center revoked the petition's approval. The Director found the accompanying labor certification from the U.S. Department of Labor (DOL) to be invalid because it contains a job offer from a different company than the Petitioner.

On appeal, the Petitioner asserts that another company acquired it and the labor certification employer. It also contends that it and the labor certification employer, a subsidiary that provided payroll services to it, together offered the job opportunity. Further, describing its listing as petitioner in this matter as harmless error, the company asks us to amend the filing in the name of the labor certification employer.[1]

Upon *de novo* review, we will dismiss the appeal.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign national, an employer must first obtain DOL certification of the job opportunity. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position, and that employment of a foreign national will not hurt wages and working conditions of U.S.

[1] The Petitioner indicated on the Form I-290B, Notice of Appeal or Motion, that it would submit a brief or additional evidence within 30 days of the appeal's filing. As of this decision's date, we have no record of receiving further submissions from the Petitioner.

workers with similar jobs. *Id.* If the DOL certifies a position, an employer must next submit the certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. If USCIS approves a petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

At any time before a beneficiary obtains lawful permanent residence, however, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a petition's erroneous approval may justify its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

USCIS properly issues a notice of intent to revoke a petition if, as of the notice's issuance, the unexplained and unrebutted record would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, revocation lies if the record as of the decision – including any proffered explanation or rebuttal evidence – would have warranted the petition's denial. *Id.* at 451-52.

II. THE VALIDITY OF THE LABOR CERTIFICATION

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for an advanced degree professional must include a valid, individual labor certification. 8 C.F.R. § 204.5(k)(4)(i). A labor certification remains valid only for the particular job opportunity stated on it. 20 C.F.R. § 656.30(c)(2).

A petitioner may use another employer's labor certification only if it establishes itself as the employer's successor in interest. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). A successor must demonstrate its acquisition of rights and obligations needed to operate a predecessor's business. A successor must: 1) fully describe and document the transfer of all, or a relevant part of, the predecessor to it; 2) demonstrate that, but for the change of employer, the job opportunity remains the same as certified; and 3) establish eligibility for a petition's approval, including the abilities of itself and the predecessor to continuously pay a proffered wage. *Id.* at 482-83.

Here, as indicated in the Director's notice of intent to revoke (NOIR), the accompanying labor certification lists the employer as a different company than the Petitioner. The Director therefore issued the NOIR for good and sufficient cause. Because the Petitioner and the labor certification employer were not the same company, the record did not establish the continued validity of the job opportunity stated on the labor certification. As of the NOIR's issuance, the unexplained and unrebutted record would have warranted the petition's denial.

In response to the NOIR, the Petitioner submitted evidence of another company's acquisition of it and the labor certification employer. In a letter, the former general counsel of the Petitioner and the employer identified the Petitioner as the labor certification employer's parent company. The former

general counsel stated that the labor certification employer provided payroll and other administrative services to the Petitioner.

Contrary to *Dial Auto Repair*, however, the record does not establish the Petitioner as a successor in interest of the labor certification employer. The Petitioner has not demonstrated its acquisition of rights and obligations needed to operate the employer's business. The record also does not fully explain and document an ownership transfer from the employer to the Petitioner. *See Matter of Dial Auto Repair*, 19 I&N Dec. at 482 (requiring a claimed successor "to fully explain the manner by which the petitioner took over the business" and "to provide . . . a copy of the contract or agreement between the two entities"). Thus, as of the revocation, the record did not establish a successor relationship between the labor certification employer and the Petitioner. The record therefore did not establish the validity of the labor certification.

On appeal, the Petitioner asserts that, regardless of its relationship to the labor certification employer, the acquirer is now the successor in interest of both it and the employer. It also contends that the labor certification and the petition contain the same job opportunity and that the employer and the Petitioner "together formed the employer." In addition, the Petitioner asserts that prior counsel should have listed the labor certification employer as the petitioner and asks us to amend the petition accordingly in light of this "harmless and unintended technical error."

The acquisition of both the Petitioner and labor certification employer, however, does not establish the Petitioner as a successor to the labor certification employer. Because the record did not establish the Petitioner as a successor of the labor certification employer, the petition was incorrectly approved in the Petitioner's name. The Petitioner has not overcome this deficiency on appeal.

Also, the regulations and the instructions to Form I-140, Petition for Alien Worker, limit a petitioner to only one entity. *See* 8 C.F.R. § 103.2(a)(1) (incorporating form instructions into the regulations). The Petitioner and the labor certification employer therefore cannot together form the employer. Only one entity is the employer entitled to file the labor certification and petition.[2] Finally, we will not amend the petition in the name of the labor certification employer. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998) (holding that a petitioner may not materially change a petition after its filing to attempt to conform to immigration service requirements). The assertions on appeal therefore do not overcome the revocation grounds.

III. CONCLUSION

For the foregoing reasons, the record does not establish the Petitioner as a successor in interest of the labor certification employer. The record therefore did not establish the validity of the labor certification.[3]

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[2] It is unclear which entity, the labor certification employer or the Petitioner, would actually have employed the Beneficiary if the labor certification employer only offered payroll services to the Petitioner.

[3] In addition to the ground of revocation cited by the Director, we note that the record does not demonstrate the

ORDER: The appeal is dismissed.

Cite as *Matter of A- Inc.*, ID# 1635289 (AAO May 3, 2018)

Beneficiary's possession of the experience required by the terms of the labor certification. A petitioner must establish a beneficiary's possession of all DOL-certified job requirements by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). Here, the labor certification states the minimum requirements of the offered position of financial analyst as a master's degree and three years of experience in the job offered or in "[a]ny related occupation." On the certification, the Beneficiary attested to her possession, by the petition's priority date, of about three years and eight months of full-time qualifying experience, including about two years with the labor certification employer, and about two years and three months of part-time qualifying experience. A labor certification employer may not rely on experience that a foreign national gained with it, unless the experience was in a substantially different position or the employer can demonstrate the impracticality of training a U.S. worker for the offered position. 20 C.F.R. § 656.17(i)(3). Here, the Beneficiary's experience with the labor certification employer was in the job offered and therefore may not be considered qualifying experience. *See* 20 C.F.R. § 656.17(i)(5)(ii) (defining a "substantially comparable" position as one requiring performance of the same job duties more than 50 percent of the time.)

The Petitioner submitted letters documenting the Beneficiary's remaining experience, including: one year and eight months of full-time experience; and two years and three months of part-time experience. For labor certification purposes, however, part-time experience equals half the amount of full-time experience. *See Matter of Cable Television Labs, Inc.*, 2012-PER-00449, 2014 WL 5478115, *1 (BALCA Oct. 23, 2014) (finding 16 months of part-time experience equivalent to eight months of full-time experience). Thus, the Beneficiary's two years and three months of part-time experience equates to only about 14 months of full-time experience. Combined with her other one year and eight months of full-time experience, the record does not establish the Beneficiary's possession of the requisite three years of full-time employment experience.